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PUSHY COURTS TAINTED MEDIATION OF CLERGY CASE

Forum Column

By Jeff Kichaven

Every year, one appellate decision stands head and shoulders above the rest in terms of elaborating the law governing mediation. This year is no exception. The prize for 2005 unquestionably goes to *Travelers Casualty and Surety Company v. Superior Court*, 126 Cal.App.4th 1131 (2005). It's the case of the year!

Travelers Casualty asks whether a mediator should ever have fact-finding, adjudicative or other coercive powers over the participants in a mediation, and correctly concludes: "No."

The case arises out of the alleged child sexual abuse litigation against the Catholic Church that has so roiled our society in general and the Los Angeles Superior Court in particular. These cases and others like them, because of their number, complexity and societal significance, pose daunting challenges to the Los Angeles Superior Court, and the court has gone to great lengths to get them settled rather than tried.

In July 2003, Judge Peter D. Lichtman was appointed as settlement judge in the 90-plus actions called "Clergy Cases I." Although Lichtman is widely regarded by the bar as one of the smartest and fairest members of the bench, he adopted a so-called settlement process that bestowed upon himself extensive fact-finding, adjudicative and otherwise coercive powers over the participants in what he still called a "mediation" - which is supposed to be a voluntary process that treasures the participants' right to self-determination.

The appellate court rightly saw this as a contradiction and delivered the rebuke that this ersatz process deserved.

As a result of the *Travelers Casualty* case, the rules of the road for mediators and mediation are more clear and more realistic and have greater integrity than ever. All mediation participants will know what to expect and what they no longer have to fear. As a result, the utility - and use - of mediation can safely be expected to increase. A closer examination of Lichtman's errant ways, and the correction of those errors, shows just why.

To begin, the court described Lichtman's errant process as follows:

"On April 30, 2004, Judge Lichtman issued an order for the parties and the insurers to participate in a 'Valuation Hearing,' after which the Court would 'render findings reflecting its determination of (i) the verdict potential of the sexual abuse cases if they were to proceed [to a jury trial], and (ii) the reasonable settlement value of such cases.' According to the April 30 order, those findings were 'intended to constitute an independent adjudication of liability and damages, based on an actual trial as that standard has been construed in California, and may be used by the parties or judicial officers in subsequent proceedings ... .' Judge Lichtman felt this method ... was warranted by the parties' inability to reach a settlement."

And, the court had no difficulty ruling at the very outset of its opinion:

"Petitioners (Travelers Casualty and others) are the Church's liability insurers. They seek to vacate a written order by a settlement judge purporting to: (1) determine the good faith settlement value of the cases; (2) preclude the insurers from declaring a forfeiture of coverage should the Church settle without their consent; and (3) provide evidence of the insurers' bad faith for future use. As set forth below, we grant the petition because the settlement judge exceeded his authority by making factual findings and otherwise preparing a coercive order in violation of the fundamental principles governing mediation proceedings."

Critical to this is the court's recognition of the statutory constraints on the role of a mediator. Based on the California Evidence Code, the court observed that, "Although mediation takes many forms and has been defined in many ways, it is essentially a process where a neutral third person who has no authoritative decision-making power intervenes in a dispute to help the parties reach their own mutually acceptable agreement." There was no doubt that all participants in Lichtman's settlement process considered it to be a "mediation."

Lichtman crafted this process to pressure the insurance carriers to finance a settlement that they did not, for whatever reasons, want to make.

Apparently, the Church wanted to settle with the plaintiffs without their insurers' consent, with a covenant that the plaintiffs would not seek collection from the Church's assets, but rather solely from its insurers.

Such an agreement, however, would have resulted in a forfeiture of the Church's coverage under the No-Voluntary-Payments provisions of its policies. *Travelers Casualty*. The forfeiture would not result, though, if an "actual trial" to determine the Church's liability had preceded the settlement.

The court found that Lichtman expressly intended his settlement process - although a mediation - also to be just such an "actual trial":

"By ordering that his settlement valuation constituted an actual trial for purposes of precluding a declaration of coverage forfeiture by the insurers, Judge Lichtman purported to make binding factual determinations. He also ruled that the Valuation Order could be used as evidentiary fodder for any future bad faith claim by the Church against the insurers. Finally, the order stated that it would become available to the parties for use in open court within 60 days, unless barred by this court. The net effect of these provisions was two-fold: First, they purported to cut off the insurers' rights to declare a coverage forfeiture in the event of an unauthorized settlement; second they dangled over the insurers' heads the threat of a bad faith action that was already fortified with the weight of a judge's findings. This left the insurers backed into a corner where the easiest way out would be to withdraw their reservation of rights and pay m oney to settle the cases." *Travelers Casualty*.

It was obvious to the court that " ... the Valuation Order's factual findings and future use provisions were coercive" and "(a)s a result, the court abandoned its designated role as a neutral facilitator without decision making authority." *Travelers Casualty*. The valuation order was therefore vacated.

The role of the mediator is constrained. No fact finding. No actual trials.

While at first this may appear to be a victory for insurance carriers over policyholders, that view would be too narrow. It is just as easy to envision a settlement-driven judge using a "valuation process" when that judge believes that the barrier to

settlement is a "greedy plaintiff" or an "aggressive policyholder," rather than "stubborn carriers." So, *Travelers Casualty* protects carriers, policyholders and third-party plaintiffs alike.

It is a victory for the integrity of both trials and mediations. Trials are supposed to be conducted by rules of evidence, civil procedure and substantive law in order to guarantee objectively fair results. Lichtman did not conduct the valuation hearing by those rules. The valuation order did not deserve to be treated as the result of an "actual trial" because it was not the result of an actual trial. Mediation, conversely, is a flexible process and provides results - whether they are settlements or not - that are best in the subjective views of the participants at the time. When serving as a mediator, Lichtman did not have the right to adjudicate anything for or against anyone.

What led Lichtman, and the Los Angeles Superior Court in general, to err so badly in the management of the clergy litigation? My armchair psychoanalysis leads me back to Viktor Frankl's classic, "Man's Search for Meaning."

The Superior Court's dead-set intention to get the clergy cases settled brings to mind Frankl's concept of "Hyper-intention" - the idea that "a forced intention makes impossible what one forcibly wishes."

By "hyper-intending" settlement of the clergy cases, the Los Angeles Superior Court may have destroyed and spoiled any such possibility. To rescue the situation, perhaps the best course for the trial court would be to rekindle the spirit of the Federal Rules of Civil Procedure, as articulated in its Rule 1, which explains that the purpose of civil procedures is "to secure the just, speedy, and inexpensive determination of every action."

To fulfill that mission, especially in cases where counsel are sophisticated, the court need only adopt the wisdom of Judge William H. Becker, the chief judge of the Western District of Missouri, who told many audiences that "except in rare instances, the most powerful and most effective stimulant of fair settlements of civil actions is the inexorable progress to trial on a date certain... ." Quoted in 6A Wright, Miller & Kane, Federal Practice & Procedure, Section 1522 (2d ed. 1990).

Lawyers, at least those above a minimal level of sophistication, and in cases of substance, will find appropriate settlement processes on their own.

Jeff Kichaven is an independent mediator in Los Angeles and an adjunct professor at Pepperdine University School of Law.